buyer was to bear the risk of loss incident to the transportation of the goods. In such an event the courts would say that the consignor retained only a special property right. Upon a proper analysis the situation would in such a case be the same as if the seller had passed the title to the purchaser and the latter had given back to the former a purchase-money mortgage. The seller would thus have reserved the bare legal title for purposes of security only, the purchaser having obtained the beneficial ownership.[15] But if this theory be applied to the present case, it would seem clear that, whatever the seller's legal obligations, the "mortgage" right which he had in fact reserved was for $1.35 per 100. This conclusion rests, not on his undisclosed intention, but on the necessary interpretation of his acts in connection with the shipment. If these acts were sufficient to confer any property right on the buyer, it was only a right subject to the shipper's title by way of security to the amount of the draft. And as the buyer had never consented to receive any property right in the goods (and accompanying risk of loss) on these terms, it would follow that no title or property right whatever passed to the buyer.

This conclusion is supported by direct authority in a case even stronger in the buyer's favor, in that the bill of lading was made out to the buyer, but forwarded to a bank with draft attached for an amount claimed to be excessive.[16] In such a case the seller retains as security, not legal title, but what is called the *jus disponendi*—a right in the nature of a lien. But the extent of the right retained is measured, not by his contract obligation as interpreted by the court, but by his acts in connection with the shipment, or specifically by the amount of the draft which accompanies the bill of lading.

### REMOVAL OF CAUSES: THE DOCTRINE OF EX PARTE WISNER

Among other cases on the subject of removal to the federal courts discussed in the February number of the present volume of the YALE LAW JOURNAL, the decision in *M. Hohenberg & Co. v. Mobile Liners, Inc.* (1917, S. D. Ala.) 245 Fed. 169, was noted.[1] The case was stated as one in which a citizen of one state sued a citizen of another state in a state court of a third state; and the holding that the defendant might remove to the federal court for the district within which the suit was pending was described as directly in conflict with the decision of the United States Supreme Court in *Ex parte Wisner*.[2]

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[15] See Williston, *Sales*, sec. 284, p. 418 f. This is also the rule adopted in the Uniform Sales Act, sec. 20 (2). The principal case, however, did not come under the act.

[16] *Greenwood Grocery Co. v. Canadian County Mill & Elevator Co.* (1905) 72 S. C. 450, 52 S. E. 191.

[1] 27 YALE LAW JOURNAL, 567.

[2] (1906) 203 U. S. 449, 27 Sup. Ct. 150.

The report of the *Hohenberg* case contains no preliminary statement of facts, nor are the facts in regard to the citizenship of the parties stated in the opinion. To determine the exact point presented for decision, it was therefore necessary to rely on inference from the argument of the court. It is believed that any reader of the opinion would draw the same inference which was drawn in our February number.[3] The editors have since been informed by a correspondent that this inference was not correct; that there were two plaintiffs, both citizens of Alabama, one residing, however, in the Middle District of Alabama and the other in the Southern District. The suit was brought in a state court in the Southern District, against a corporation of Louisiana. The question thus presented on proceedings for removal is not wholly novel, as will appear below, nor does it require any modification of our previous conclusion that the decision is directly opposed to the doctrine of *Ex parte Wisner*,[4] but it does furnish one further argument against the soundness of that much doubted decision, which is not applicable to the case where neither plaintiff nor defendant is a citizen of the state in which the suit is brought. The subject is perhaps of sufficient practical importance to justify a more extended examination.

The *Wisner* case arose under the Judiciary Act of 1887, as amended in 1888,[5] but as the adoption of the federal Judicial Code of 1911,[6] now in force, involved only a rearrangement of the provisions in regard to removal, with no change in substance affecting the question now under discussion, it will be sufficient to quote the sections of the present law.

Section 24 provides that "the district courts shall have original jurisdiction . . . of all suits of a civil nature . . . between citizens of different states."

Section 51 provides that:

"No civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded

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[3] The nearest approach to a statement of specific facts is in the closing sentences of the opinion (p. 173), which are as follows:

"If plaintiff, being a resident of one state, and defendant of another, bring his suit in a federal court of a third state, defendant can, by appearing generally, waive the objection as to venue, and such court has jurisdiction to try such suit. If therefore, plaintiff brings his suit in a state court, defendant is given by section 28 the right to remove it to this same court, and it has just as much jurisdiction to try such case as if plaintiff had originally brought it there.

"I therefore conclude that the motion to remand should be denied."

[4] *Supra*, note 2.

[5] 24 U. S. St. at L. 552; 25 *ibid.* 433.

[6] 36 U. S. St. at L. 1087; 1 U. S. Comp. St. 1916, Ann. 532. The sections specifically referred to in the text are found in 1 U. S. Comp. St. 1916, Ann. on the following pages: section 24 on p. 553; section 51 on p. 1116; section 28 on p. 841; section 29 on p. 954.

only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant."

Section 28, after providing for the removal of suits arising under the Constitution or laws of the United States, proceeds as follows:

"Any other suit of a civil nature . . . of which the district courts of the United States are given jurisdiction by this title, and which . . . may hereafter be brought, in any State court, may be removed into the district court of the United States for the proper district by the defendant or defendants therein, being nonresidents of that State."

Section 29 provides that:

"Whenever any party entitled to remove any suit mentioned in the last preceding section . . . may desire to remove such suit from a State court to the district court of the United States, he may make and file a petition, duly verified, in such suit in such State court . . . for the removal of such suit into the district court to be held in the district where such suit is pending, . . . ."

It will be noted that two of the above sections (24 and 51) purport to deal only with original jurisdiction and original process; in fact they are expressly so limited. That part of section 24 which is material to the present inquiry requires diversity of citizenship as the basis of jurisdiction; and section 51 limits the venue to the district of residence of plaintiff or defendant. Sections 28 and 29, on the other hand, deal expressly with removal. By section 28 the cases which can be removed are limited to those of which the district courts are given original jurisdiction "by this title." In the Act of 1887-8 the words were "by the preceding section"; and the preceding section combined the present sections 24 and 51.[7] This clearly limits the cases which can be removed to those described in section 24. Does it further adopt and incorporate into the removal provisions the limitation to the district of residence of the plaintiff or defendant which is now found in section 51? The argument that it does would seem to rest on the construction of the words "of which the district courts of the United States are given jurisdiction," as found in section 28. Does "jurisdiction" here include venue? Or to put it in another way, are the venue provisions of section 51 strictly jurisdictional?

The words of section 28 would seem to favor a negative answer. That section refers to suits of which "the district courts" generally are given jurisdiction, not those of which any particular district court, such as "the district court of the district in which the suit is pending" or "the district court to which removal is sought," is given jurisdiction.

[7] Section 1 of the Judiciary Act of 1887-8 (note 5, *supra*). This was true also of the earlier act of 1875 (18 U. S. St. at L. 470).

A stronger argument is based on the character of the provisions in sections 24 and 51 respectively, and the way they are expressed. There is a clear distinction between jurisdiction of the *cause,* without which all proceedings are a nullity, and power to subject a particular defendant to process against his will. The wording of the statutes seems to recognize this distinction. Section 1 of the Act of 1887-8[8] first enumerated the suits of which the federal circuit courts should have original "cognizance." This enumeration was in form complete and unqualified. Then was added the following sentence:

"But no person shall be arrested in one district for trial in another in any civil action before a circuit or district court; and no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; but where the *jurisdiction* is founded only on the fact that the action is between citizens of different states, *suit shall be brought* only in the district of the residence of either the plaintiff or the defendant; . . . ."

The Judicial Code emphasizes the distinction still more clearly. The first part of section 1 of the Act of 1887-8 is placed by itself in section 24 of the Judicial Code, and the word "cognizance" is changed to "jurisdiction." The provisions in regard to the district in which the suit may be brought are placed in a different section, and one widely separated from the section which now in terms defines the "jurisdiction" of the district courts.

Finally this distinction is authoritatively recognized by the Supreme Court. The doctrine that, while the provisions now found in section 24 are jurisdictional in the strict sense, those now placed in section 51 are intended for the protection of the defendant, and confer merely a personal privilege or immunity which can be waived, had been consistently followed by the Supreme Court before the decision in *Ex parte Wisner,* and the *dictum* to the contrary in that case has since been overruled.[9]

On the whole, the most natural conclusion would seem to be that when section 28 authorized removal of all suits "of which the district courts of the United States are given jurisdiction by this title," or, as it read in section 2 of the Act of 1887-8, "of which the circuit courts of the United States are given jurisdiction by the preceding section," the limitation intended in both statutes was to those cases which come within the enumeration now found in section 24, including cases of diversity of citizenship, and not the further limitation of venue, expressly applicable only to "original process or proceeding," now

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[8] *Supra,* note 5.

[9] See *In re Moore* (1908) 209 U. S. 490, 28 Sup. Ct. 585, which cites the earlier cases, and *Western Loan & Savings Co. v. Butte Mining Co.* (1908) 210 U. S. 368, 28 Sup. Ct. 720.

found in section 51. This conclusion is enforced, as will appear below, by a consideration of the practical results of the opposite construction, in their relation to the policy presumably underlying the constitutional and statutory provisions in regard to the jurisdiction of the federal courts.

It would follow that when a citizen of one state sued a citizen of another state in a state court of a third state, the case would be one "of which the districts courts . . . are given jurisdiction" by section 24, and the defendant, "being a nonresident of" the state of suit, would have, under section 28, an absolute right of removal to the federal district court "for the proper district." From the procedural provisions of section 29, the "proper district" would seem to be very clearly the district in which the case is pending.

The right of removal in such a case had not been passed on by the Supreme Court before *Ex parte Wisner,* but the question had come often before the lower federal courts, and the overwhelming weight of authority was in favor of the right and in accord with the above conclusions.[10] The decision in *Ex parte Wisner*[11] was directly to the contrary. It was rendered without citing or noticing the score or so of lower federal court decisions on the subject, and though the opinion (by Chief Justice Fuller) was not remarkably clear, it appeared to proceed on two grounds. In certain respects not directly touching the present inquiry the Act of 1887-8 had expressly narrowed the jurisdiction of the federal courts and the right of removal.[12] The first ground relied on in the *Wisner* case seems to have been that "in view of the intention of Congress by the Act of 1887 to contract the jurisdiction of the circuit courts," the limitation in cases of diversity of citizenship to the district of residence of the plaintiff or the defendant must be regarded as jurisdictional in the strict sense, so that no consent or waiver could confer jurisdiction on any other federal court. The second ground was that, even if the limitation to particular districts could be waived by consent of both parties, and jurisdiction thus conferred on a district court of a district in which neither resided, there had been no such waiver in the case at bar. The petition for removal was characterized as "in the nature of process," and the action of the defendant in filing such petition was likened to the action of a plaintiff who sues in a federal court in a district in which both parties are non-residents. As such a suit cannot be maintained by a

[10] See authorities collected in *Louisville & N. R. R. Co. v. Western Union Tel. Co.* (1914, E. D. Ky.) 218 Fed. 91, 93-95.

[11] *Supra,* note 2.

[12] The Act of 1875 had allowed suit to be brought in the federal courts in any district in which the defendant could be found, had given the plaintiff as well as the defendant the right to remove, and in diversity of citizenship cases had not limited the defendant's right of removal to cases in which he was a non-resident of the state of suit.

non-resident plaintiff against the objection of the non-resident defendant, so the court held that the petition for removal by a non-resident defendant could not be maintained against the objection of the non-resident plaintiff.

So far as the decision rested on the first ground, it was very shortly overruled by *In re Moore*[13] and the former rule reëstablished, to the effect that the statutory limitation to the district of residence of one of the parties may be waived by voluntary appearance, pleading to the merits, entering into stipulations, or otherwise submitting to the jurisdiction of the court. The facts in *In re Moore* were the same as in *Ex parte Wisner,* except that the plaintiff, after removal, and before moving to remand, had filed an amended complaint in the federal court, and entered into a stipulation giving the defendant time to plead. Chief Justice Fuller, dissenting in *In re Moore,* adhered to the views he had expressed in *Ex parte Wisner.* The latter decision, however, if it stands at all,[14] must now stand on the second ground above stated.[15] Thus limited, its doctrine apparently is that, in diversity of citizenship cases, a defendant may remove to a federal court only if, as plaintiff, he could have sued the actual plaintiff, as defendant, in the same federal court.[16] It follows that where both parties

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[13] *Supra,* note 8. *Accord, Western Loan & Savings Co. v. Butte Mining Co., supra,* note 8; *Male v. Atchison, etc., Ry. Co.* (1916) 240 U. S. 97, 101; 36 Sup. Ct. 351, 353.

[14] Its decision on another point, namely the propriety of *mandamus* as a remedy for refusal to remand, was overruled in *Ex parte Harding* (1911) 219 U. S. 363, 31 Sup. Ct. 324.

[15] The first ground was at least consistent. If both the requirements now found in section 24 and those now found in section 51 are jurisdictional in the strict sense, then the word "jurisdiction" in section 28 would naturally refer to both. The second ground treats the word "jurisdiction" in section 28 as used in a sense sufficiently broad to include not only the requirements of section 24, which all agree are jurisdictional and cannot be waived, but also those of section 51, even though the latter be conceded to confer only a personal privilege which can be waived—a not impossible construction, but one not very convincing. The real source of the error, if error there was, in *Ex parte Wisner* seems to have been a misplaced reliance on general statements in earlier cases to the effect that a suit is not removable unless it is one the plaintiff could originally have brought in the federal court. If this means in *a* federal court, the statement is of course sound, and that was all that was involved in the earlier cases relied on. To say that a case is not removable to a particular federal court, unless it could have been brought originally in the same federal court, is another proposition.

[16] This is in effect the interpretation of the *Wisner* case adopted in such cases as *Keating v. Pennsylvania Co.* (1917, N. D. Oh.) 245 Fed. 155 (discussed in 27 YALE LAW JOURNAL, 567) holding that a non-resident defendant sued in a state court by an alien may remove to the federal court in the district in which the suit is pending, since an alien may be sued in the federal court in any district where he may be found. This interpretation also would explain the action of the Supreme Court in *In re Tobin* (1909) 214 U. S. 506, 29 Sup. Ct. 702, in

are non-residents of the state in which the suit is pending in a state court, there can be no removal, without the plaintiff's consent, to the federal court "in the district where such suit is pending." And as no procedure is provided for removal to any other district, it seems to follow that the case cannot be removed at all.[17]

However doubtful as a matter of statutory construction, this result would not seem to involve any great injustice, or conflict with any essential policy involved in the establishment of federal courts, so long as its application is limited to cases where both plaintiff and defendant are non-residents of the state of suit. Notwithstanding the many difficult questions that have arisen in construing the jurisdictional provisions of the various judiciary acts, and especially those relating to diversity of citizenship, and the considerable conflict of opinion over various points, the cases are singularly lacking in discussion of the general policy which presumably underlay both the constitutional extension of the federal judicial power to controversies between citizens of different states, and the legislation enacted by Congress to put this grant into effect. The most obvious purpose of the removal provisions would seem to be, as suggested in one of the cases,[18] to protect a non-resident sued in the plaintiff's own state againt any possible local favoritism on the part of the state court, by affording him the option of removing to a supposedly impartial tribunal.[19] If this be the purpose, there is no similar reason for removal when both parties are non-residents of the state in which the suit is brought.

But a different situation is presented when there are two or more federal districts within a state, and the plaintiff, being a resident of the state, sues a non-resident defendant in a state court, but not in the district of the plaintiff's residence. If we apply the rule of *Ex parte Wisner,* the suit is not removable. Under section 29 it can be removed, if at all, only to the district court in the district where the suit is pending. But that is not, in the language of section 51, "the district of the residence of either the plaintiff or the defendant," and neither

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refusing, without opinion, a writ of *mandamus* to compel the remanding of a case like the *Keating* case. For speculation on the significance of *In re Tobin,* see the *Keating* case, at p. 161; *Sagara v. Chicago, etc., Ry. Co.* (1911, D. Colo.) 189 Fed. 220, 223; and *Louisville & N. R. R. Co. v. Western Union Tel. Co.* (1914, E. D. Ky.) 218 Fed. 91, 103-104.

[17] The attempts of certain federal courts to avoid this result, and, by disregarding the procedural limitation of section 29 of the Judicial Code, to permit removal to the district of the defendant's residence, were referred to in 27 YALE LAW JOURNAL, 567.

[18] *Foulk v. Gray* (1902, C. C. S. D. W. Va.) 120 Fed. 156, 164.

[19] Conversely a non-resident plaintiff, forced to go to the defendant's own state to bring his suit in order to obtain service, is allowed to avail himself of the federal court there. And his option to choose the federal court of his own district, if he can obtain service there, may be explained as merely anticipating the defendant's right of removal.

could have brought an original suit against the other in that district. Hence under *Ex parte Wisner* the defendant cannot remove to that district.[20] The result is that the plaintiff obtains whatever advantage there may be in suing in a court of his own state a non-resident defendant. If local favoritism on the part of state courts is to be feared, it would hardly be limited by the arbitrary lines of federal districts; and the apparent policy of the Constitution and the judiciary acts is thus defeated.

The one federal case found, before the *Hohenberg* case, which was decided in the teeth of *Ex parte Wisner,* was of this sort.[21] Nor was there any dodging of the issue. It was frankly admitted that *Ex parte Wisner* was a direct authority against the removal; but Judge Cochran, in a voluminous and very able opinion, reviewed the authorities both before and after the *Wisner* case, and reached the conclusion, not only that *Ex parte Wisner* was wrong, but that it had been so weakened by subsequent Supreme Court decisions, and was so certain to be overruled altogether at the first opportunity, that he was justified in rejecting its authority. Other federal judges have since applauded his reasoning, but have stopped short of following him to the ultimate conclusion.[22]

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[20] It was so held in *Shawnee Nat. Bk. v. Missouri, K. & T. Ry. Co.* (1909, E. D. Okla.) 175 Fed. 456, and *Wheeler v. Atchison, etc., Ry. Co.* (1911, W. D. Mo.) not separately reported, but quoted in *Stone v. Chicago, etc., R. R. Co.* (1912, W. D. Mo.) 195 Fed. 832, 833.

[21] *Louisville & N. R. R. Co. v. Western Union Tel. Co., supra,* note 10.

[22] Another *reductio ad absurdum* of the doctrine of the *Wisner* case has resulted from its application to the removal of suits arising under the Constitution or laws of the United States. The statutory provisions governing this question are found in the same sections as those governing the removal of diversity of citizenship cases, and are substantially similar, except that an original suit may be brought only in the district where the defendant resides, and the right of removal is not restricted to a non-resident defendant. On the authority of *Ex parte Wisner* it has been held, in effect, that an "arising under" suit may be removed only when the state court in which it is pending is in the district of the defendant's residence, so that the plaintiff could have brought the suit originally in the federal court of that district. *Western Union Tel. Co. v. Louisville & N. R. R. Co.* (1912, E. D. Tenn.) 201 Fed. 932 and cases there cited. These decisions find some support in the language of the Supreme Court in *Matter of Dunn* (1909) 212 U. S. 374, 384, 387 ff., 29 Sup. Ct. 299, 301, 303. It may be suggested that it would be more consistent with the reasoning of the *Wisner* case, as interpreted above, and would produce a somewhat less illogical result, if in these cases the defendant petitioning for removal were regarded as the moving party, in a position analogous to that of a plaintiff bringing an original suit in the federal court, and the actual plaintiff as the defendant in the removal proceedings, and removal were therefore restricted to cases pending in a state court in the district of residence of the removal-defendant, that is, the actual plaintiff. But that is not the view taken by the cases cited.

The underlying reason for giving the federal courts original jurisdiction of suits arising under the federal Constitution or laws, and for permitting the

The *Hohenberg* case, as the facts are stated by our correspondent, presented in substance the same question. One plaintiff, it is true, was a resident of the district in which the case was pending in the state court; but it is settled that to give jurisdiction in the district of the plaintiff's residence under section 51 of the Judicial Code (or the corresponding provisions of earlier acts) *all* the plaintiffs must be residents of the district.[23] So far as removal was concerned, therefore, the case was the same as if both plaintiffs, instead of only one, had been residents of a different district of Alabama from that in which the suit was brought. The case would furnish weightier support to Judge Cochran's views if it had faced the issue with equal frankness. Our correspondent, who approves the decision, informs us that it was thrice argued, and that *Ex parte Wisner* was much relied on by the plaintiffs; but the opinion cites neither that case, nor Judge Cochran's decision, nor any other authorities. Under these circumstances, it rather adds to than helps to clear up the uncertainty in which the law now stands.

## JUDGMENTS BASED ON PRESUMPTION OF DEATH AS AFFECTING AN ABSENTEE'S RIGHTS

To determine the effectiveness of a judgment based upon the presumption of death arising from several years' absence[1] to protect a person who acts in reliance upon the judgment against claims of the

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removal of such suits, is obviously to give either party the option of having a federal question decided in the first instance by a federal court. This option on the part of the plaintiff can in no way be defeated by the defendant. The defendant's right should be equally assured. But the result of the above decisions is to permit the defendant to remove only in the cases where he presumably cares least about doing so, namely, where he is sued in his own state court; to leave the choice between state and federal courts for the trial of a federal question wholly in the hands of the plaintiff, provided only that he can secure service on the defendant in some state where the latter does not reside; and to make the right of removal depend on an accidental circumstance which, in this class of cases, has nothing whatever to do with the real reason for allowing removal at all.

[23] *Smith v. Lyon* (1890) 133 U. S. 315, 10 Sup. Ct. 303; *Turk v. Illinois Cent. R. R. Co.* (1914, C. C. A. 6th) 218 Fed. 315.

[1] It is held almost universally that a rebuttable presumption of death arises when a person has been absent from his last or usual place of residence and no tidings of him have been received for a considerable period of time. Usually the necessary period of absence is established as seven years. The beginning of this seven year presumption as a common law rule applicable in all questions of life and death is found in *Doe v. Jesson* (1805, K. B.) 6 East 80. For the origin and history of the presumption, see James Bradley Thayer, *Presumptions and the Law of Evidence* (1889) 3 HARV. L. REV. 151-154. The rule is sometimes modified by statute. See 2 Chamberlayne, *Evid.* sec. 1097 *et seq.*